Supreme Court, U.S.
FILED

'00 1 31 JUL 24 2000

OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States

K.D.M., a minor, by and through his father and next friend, W.J.M.,
Petitioner,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,
Defendant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
RICHARD W. GARNETT
Notre Dame Law School
Notre Dame, IN 46556
(219) 631-6981

MICHAEL STOKES PAULSEN
University of Minnesota
Law School
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-0018

DAVID C. GIBBS, JR.
Counsel of Record
DAVID C. GIBBS III
CHARLOTTE A. COVER
BARBARA J. WELLER
GIBBS LAW FIRM, P.A.
5666 Seminole Boulevard,
Suite 2
Seminole, Florida 33772
(727) 399-8300
Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

84 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Free Exercise Clause of the First Amendment to the United States Constitution permits the State of Oregon to deny on-site special education benefits to otherwise eligible disabled children solely on the basis of the religious setting of the schools chosen for them by their parents.

2. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution permits the State of Oregon to deny on-site special education benefits to a class of otherwise eligible disabled children solely on the basis of the religious setting of the schools chosen for them by their parents.

PARTIES TO THE PROCEEDINGS

Petitioner

Kai D. Moore, a minor, by and through William J. Moore, his father and next friend

Respondent

Reedsport, Oregon School District

Respondent

Norma Paulus, in her official capacity as Oregon Superintendent of Public Instruction

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
I. The Decision Below Conflicts Directly with the Eighth Circuit's Decision in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).	11
II. The Ninth Circuit's Requirement That Petitioner Produce Evidence of the Substantial Burden Imposed by Respondent's Facially Discriminatory Rule Conflicts with This Court's and Other Circuit Courts' Analysis of Non-Neutral Governmental Action	13
III. The Decision Below Conflicts with This Court's Precedents Holding That the First Amendment Forbids Discriminatory Exclusion from a Government Program, Benefit, or Forum on the Basis of Religious Belief, Exercise, Affiliation, or Expression	16

TABLE OF CONTENTS—Continued

Page

A. The Decision Below Conflicts with This Court's Decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)..... 17

B. The Decision Below Conflicts with This Court's Decision in *McDaniel v. Paty*, 435 U.S. 618 (1978)..... 19

IV. The Questions Presented Are of National Importance and Affect the Nation's Efforts to Protect the Rights of Children with Disabilities and Parents of Such Children..... 20

CONCLUSION..... 22

APPENDIX

A. *KDM ex rel. v. Reedsport Sch. Dist.*, 210 F.3d 1098 (9th Cir. 2000)..... 1a

B. *KDM ex rel. v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999)..... 4a

C. *KDM ex rel. v. Reedsport Sch. Dist.*, No. 96-6075-HO (D. Or. filed January 5, 1998) (unreported opinion of the United States District Court for the District of Oregon)..... 26a

D. Order of Oregon Superintendent of Public Instruction (1995)..... 36a

E. 20 USC §§1400-1485 (1998) in relevant part..... 49a

F. OR. ADMIN. R. 581-015-0166 (1995) in relevant part..... 53a

TABLE OF AUTHORITIES

Cases: Page

Agostini v. Felton, 521 U.S. 203 (1997) 21
Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) 5, 11
Brown v. Borough of Mahaffey, 35 F.3d 846 (3rd Cir. 1994) 9, 14, 15
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 8, 9, 12, 14, 15, 16, 17, 18, 19
Employment Div. of Oregon v. Smith, 494 U.S. 872 (1990) 15, 16, 17, 18, 19
Everson v. Board. of Educ., 330 U.S. 1 (1947) 16, 17
Fowler v. Rhode Island, 345 U.S. 67 (1953) 18
Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) ... 9, 15
KDM ex rel. v. Reedsport Sch. Dist., 196 F.3d 1046 (9th Cir. 1999) 1, 5, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18
KDM ex rel. v. Reedsport Sch. Dist., 210 F.3d 1098 (9th Cir. 2000) 1, 10, 11
KDM ex rel. v. Reedsport Sch. Dist., No. 96-6075-HO (D. Or. filed January 5, 1998) 1, 5, 7
Larson v. Valente, 456 U.S. 228 (1982) 18
McDaniel v. Paty, 435 U.S. 618 (1978) 16, 18, 19, 20
Mitchell v. Helms, No. 98-1648, 2000 WL 826256 (U.S. La. June 28, 2000) 21
Mueller v. Allen, 463 U.S. 388 (1983) 21
Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998) ... 8, 9, 10, 11, 12, 13, 15
Romer v. Evans, 517 U.S. 620 (1996) 12
Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995) 12, 21
Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 329 (1999) 7

TABLE OF AUTHORITIES—Continued

	Page
Westendorp v. Independent Sch. Dist. No. 273, 35 F. Supp. 2d 1134 (D. Minn. 1998)	12
Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986)	21
Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)	21

Constitutional Provisions:

U.S. Const. amend. I	2
U.S. Const. amend. XIV	2
Or. Const. art. I, § 5	3

Statutory Provision:

20 U.S.C. §§ 1400-1485 (Supp. 1998).....2, 4, 5, 20

Regulatory Provision:

OR. ADMIN. R. 581-015-0166 (1995).....3, 5, 6, 11

PETITION FOR A WRIT OF CERTIORARI

Petitioner KDM, a minor, by and through WJM, his father and next friend, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *KDM ex rel. v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), entered on November 15, 1999.

OPINIONS BELOW

The decision of the United States District Court for the District of Oregon is *KDM ex rel. WJM v. Reedsport Sch. Dist.*, No. 96-6075-HO (Trial Division, Department of Justice, Salem, Oregon), (January 5, 1999), is unreported and is reprinted in the Appendix to this Petition, at Appendix C (App. C at 26a-35a).

The decision of the United States Court of Appeals for the Ninth Circuit is *KDM ex. rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), and is reprinted in the Appendix to this Petition, at Appendix B (App. B at 4a-25a).

The Order of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing and petition for rehearing en banc is *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 210 F.3d 1098 (9th Cir. 2000), and is reprinted in the Appendix to this Petition, at Appendix A (App. A at 1a-3a).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 15, 1999 (App. B at 4a). Petitioner's timely petition for rehearing and petition for rehearing en banc was denied on April 25, 2000 (App. A at 2a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . .

U.S. CONST. amend. 1.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state . . . shall . . . deny to any person within its jurisdiction the equal protection of the laws. . . .

U.S. CONST. amend. 14, § 1.

United States Code

Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§ 1400-1485 (1998)

Pertinent sections of the IDEA are reprinted in the Appendix to this Petition, at Appendix E (App. E at 49a-52a). Section 1412(a) provides, in relevant part:

(5) Least restrictive environment

(A) In general

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions, . . . are educated with children who are not disabled, and . . . removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, . . .

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

Oregon Constitution

Article I of the Oregon Constitution provides, in relevant part:

> No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, ...

OR. CONST. art. I, § 5.

Oregon Administrative Rules

The Oregon Administrative Rule at issue in this case, OR. ADMIN. R. 581-015-0166 (1995), is reprinted in the Appendix to this Petition, at Appendix F (App. F at 53a-55a), and provides, in relevant part:

(3) [S]pecial education and related services shall be provided in a religiously-neutral setting.

STATEMENT OF THE CASE

This case presents the question whether a public school district may refuse to provide on-site special education services to a child with disabilities solely on the basis of his attendance at a religious rather than a non-religious private school.

1. Petitioner Kai Moore is a 14-year-old boy, who lives with his parents, William and Gwen Moore, in an area of rural Oregon served by the Reedsport School District. Department of Public Instruction Order (hereinafter "DPI Order"), Finding of Fact No. 1 (hereinafter "FF") (App. D at 37a). Kai is blind and suffers from cerebral palsy, but otherwise possesses full cognitive abilities. Kai's disabilities identify him as a "child with disabilities" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* DPI Order, FF 2 (App. D at 37a). By law, he is eligible for a broad range of special education benefits, to be determined by his public school district. DPI Order, FF 3 and 5 (App. D at 37a).

Since 1993, Kai has been enrolled in Harbor Baptist Church School, a school that teaches the religious values and ideals the Moores wish Kai to learn as part of his education and upbringing. DPI Order, FF 6 (App. D at 38a). Under the IDEA, as administered by the State of Oregon, Kai is entitled to receive special education services as provided by his public school district, even though he attends private school. DPI Order, FF 3 (App. D at 37a). *See also* OR. ADMIN. R. 581-015-0166(2) (1995) (App. F at 53a). Federal law permits, but does not require, IDEA services to be provided on the premises of a private school. *See* 20 U.S.C. § 1412(a)(10)(A)(i)(II) (1998) (App. E at 50a).

The Reedsport School District's policy is to provide special education services, whenever possible, in the child's regular school setting, including on the premises of a child's private school. DPI Order, FF 3, 4, 5 and 8 (App. D at 37a, 38a).

However, an Oregon administrative rule forbids the provision of special education services at a private school if the private school is a religious school. OR. ADMIN. R. 581-015-0166(3) (1995) (App. F at 53a). As a consequence, the policy and practice of the Reedsport School District is to provide on-site special education services to children with disabilities attending public schools and *non-religious* private schools, but withhold such services from children with disabilities attending *religious* private schools. *See KDM ex rel. v. Reedsport Sch. Dist.*, No. 96-6075-HO (D. Or. filed January 5, 1998) (App. C at 33a).[1]

The parties stipulated that if Kai attended either a public school or a non-religious private school, his special education services would be provided on-site. It is only because Kai attends a religious private school that respondent school district will not provide services on-site. DPI Order, FF 8 (App. D at 38a). As the court below recognized, the operation of the Oregon administrative rule " 'discriminates' against students in religious schools, i.e., treats them differently by denying them state services on the school grounds" of a private religious school, but not on the grounds of a private non-religious school. *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1051 (1999) (App. B at 11a).

2. The Moore family first sought relief in an administrative hearing. The hearing officer found as facts,

---

[1] Under IDEA, children with disabilities are to be provided special services in the "[l]east restrictive environment." 20 U.S.C. § 1412(a)(5) (App. E at 49a-51a). Removal from the child's "regular educational environment" is discouraged under the IDEA. 20 U.S.C. § 1412(a)(5)(A) (App. E at 49a-50a). *See Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("If the government provides this education on-site at public schools and at nonsectarian private schools,it is only fair that it provide it on-site at sectarian schools as well.").

consistent with the parties' stipulation, that Kai is legally blind and has cerebral palsy, is entitled to receive special education assistance on the basis of his disability, that the Moores enrolled Kai in Harbor Baptist Church School "based on their sincerely-held religious conviction and beliefs," and that "[Kai] is not being provided the services of a vision specialist in his regular classroom at the Harbor Baptist Church School by the District *because of the religious nature of the school*. This is the sole issue in the dispute." DPI Order, FF 2-6 and 8 (emphasis added) (App. D at 38a).

The hearing officer noted that the services "are provided at a nearby fire hall because Oregon law prohibits the services from being provided in the school." DPI Order at 6 (App. D. at 42a). *See also* OR. ADMIN. R. 581-015-0166(3) (1995) (App. F at 53a). The hearing officer concluded that the denial of on-site services to Kai was both appropriate and required. *See* DPI Order (App. D at 46a).

3. Having exhausted administrative remedies, the Moores brought this action in the United States District Court for the District of Oregon. Following a bench trial on stipulated facts, the district court entered judgment holding that the IDEA did not require the District to provide services at a private school, but that the Oregon Administrative Rule which permits services to be provided to private school students only in a non-religious setting violates the Free Exercise, Establishment, and Equal Protection Clauses of the United States Constitution.

The district court held that after the District made a decision to provide on-site disability services in private schools, the State could not then deny them to a student merely because he attended a private religious school. The district court held that such a denial imposes a burden on Kai and his parents' "free exercise rights by forcing them to choose between enrolling at Harbor Baptist and receiving special education at the fire hall or enrolling at a non-

religious school and receiving in-class services." *KDM ex rel. v. Reedsport Sch. Dist.*, No. 96-6075-HO, slip op at 8. (D. Or. filed January 5, 1998) (App. C at 32a).

The district court concluded that Oregon's Rule violates the Equal Protection Clause because it lacks either a compelling justification or a rational basis and "has the effect of allowing in-class services to disabled students at non-religious schools, both public and private" while prohibiting in-class services to disabled students at religious schools, DPI Order at 6 (App. C at 33a). The court then enjoined the District "from following a policy of providing special education and related services to disabled students at religious schools on different terms than provided to disabled students at non-religious schools." DPI Order at 6 (App. C at 33a).

4. A panel of the United States Court of Appeals for the Ninth Circuit reversed the district court by a divided vote (2-1), Judge Kleinfeld dissenting. *KDM ex rel. v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999) (App. B. at 4a-26a). The majority acknowledged that the "regulation . . . 'discriminates' against students in religious schools, i.e., treats them differently by denying them state services on the school grounds." *Id.* at 1051 (App. B at 11a). Nonetheless, the panel majority concluded, "Oregon's regulation as applied to KDM and his parents does not impose an impermissible burden on their free exercise of religion." *Id.* (App. B at 11a). Kai could still receive special education services "at the fire hall down the street." *Id.* (App. B at 10a). The panel held that official discrimination on the basis of religion in a government program does not itself violate the Free Exercise Clause in the absence of "evidence of a 'substantial animus . . . that motivated the law in question.' " *Id.* at 1051 (quoting *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 329 (1999) (App. B. at 11a). The panel believed that "the Oregon regulation is not 'neutral' " with respect to religion. *KDM*, 196 F.3d at 1050 (App. B. at 10a).

Nonetheless, the panel concluded the Free Exercise Clause requires a further showing that even a facially discriminatory statute has the object or "purpose" of suppression of "religion or religious conduct." *Id.* at 1051 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)) (App. B at 11a). The panel concluded that "[t]he mere fact that the District makes its service to KDM available in the fire hall down the street from his school does not amount to suppression of religion or religious conduct." *KDM*, 196 F.3d at 1051 (App. B at 10a).

The panel stated that *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), which reached the opposite result on similar facts, was distinguishable. The panel did not suggest that the result in *Peter* was based on a showing of religious animus, however. Rather, the panel thought the case distinguishable on the ground that the plaintiff in *Peter* "was forced to choose" between attending religious school and "receiving services essential to his ability to attend school." *KDM*, 196 F.3d at 1051 (App. B at 9a-10a). The panel did not, however, dispute findings of the hearing officer that KDM could not receive on-site disability services at his religious school.

The panel also rejected the Equal Protection Clause claim, on the ground that "parochial school students are not a suspect class." *Id.* at 1052 (App. B at 13a). The panel concluded that the State of Oregon's interpretation of its state constitution was a sufficiently "rational basis" for discriminating against a child with disabilities in provision of special education benefits on the basis of the child's attendance at a religious school. *Id.* (App. B. at 13a).

Judge Kleinfeld vigorously dissented, citing conflicting rulings by this Court and by three other circuits. Judge Kleinfeld wrote:

> Under today's decision the government may discriminate against people based on their exercise of

> religion, so long as the discriminatory burdens it imposes are not more substantial than requiring a blind child with cerebral palsy to leave his school building and go down the street to a fire hall. That is quite a surprise. Fortunately, that is not the law in most of the rest of the country. The Supreme Court and the Third, Sixth, and Eighth Circuits have all held to the contrary—the Eighth Circuit in a case materially identical to this one.

KDM, 196 F.3d at 1052 (Kleinfeld, J., dissenting) (footnotes omitted) (*citing, inter alia, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3rd Cir. 1994); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); and *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998)) (App. B. at 15a).

Judge Kleinfeld identified the error in the panel's Free Exercise Clause analysis as its reliance on the test used when laws are neutral with respect to religion, rather than the test used when a law or rule is religiously discriminatory on its face. *See KDM*, 196 F.3d at 1053 (Kleinfeld, J., dissenting) (App. B at 16a). Judge Kleinfeld noted that, by the majority's own admission, this was a case of the latter type. "When the government, by a law not neutral on its face, treats people of one or all religions better or worse than others, the constitutional question is traditionally formulated so that the answer has to be 'No!' " *Id.* (Kleinfeld, J., dissenting) (App. B at 16a). In the instant case, "[h]andicapped children at secular private schools get special education in their schools, but handicapped children at religious private schools must leave school to get the same education. This law violates the Constitution because it distinguishes between people and burdens some of them on account of their religious practices." *Id.* (Kleinfeld, J., dissenting) (App. B at 17a).

Judge Kleinfeld noted that the majority's opinion "puts us at odds with three other circuits to have considered analogous issues." *Id.* (Kleinfeld, J., dissenting) (App. B. at 17a). In

particular, he emphasized that the Eighth Circuit's decision in "*Peter v. Wedl* is materially identical to the case we decide today, yet the Eighth Circuit reache[d] the opposite conclusion." *Id.* at 1054 (Kleinfeld, J., dissenting) (App. B at 19a). The Eighth Circuit held that "[g]overnment discrimination based on religion violates the Free Exercise Clause of the First Amendment." *Id.* (Kleinfeld, J., dissenting) (quoting *Peter*, 155 F.3d at 995, where the Eighth Circuit struck down a Minnesota regulation essentially identical to the Oregon regulation as a violation of the Free Exercise, Equal Protection, and Free Speech Clauses) (App. B at 19a). Judge Kleinfeld found that "[t]he majority's attempt to distinguish *Peter* makes no sense because, there, as here, the regulation allowed special education services only at a religiously 'neutral site.' " *Id.* at 1055 (Kleinfeld, J., dissenting) (citation omitted) (App. B at 21a). "That case and this one are, for analytic purposes, carbon copies." *Id.* (Kleinfeld, J., dissenting) (App. B at 21a).

5. Rehearing en banc was denied on April 25, 2000, with six judges dissenting (O'Scannlain, Kozinski, T.G. Nelson, Kleinfeld, Tashima, and Wardlaw). *KDM v. Reedsport Sch. Dist.*, 210 F.3d 1098 (2000) (App. A at 1a-3a). The dissent embraced Judge Kleinfeld's panel dissent and further emphasized that "the panel majority's opinion, in crafting a *de minimis* exception to the Free Exercise Clause's requirement of neutrality toward religion, contributes to the growing confusion among the lower courts over the demands of the First Amendment." *Id.* at 1099 (O'Scannlain, J., dissenting from denial of rehearing en banc) (App. A at 3a). The six judges concluded:

> It cannot be denied that this case, which simultaneously implicates the Free Exercise, Establishment, and Equal Protection Clauses, involves questions of extraordinary importance. . . . [T]he panel majority's opinion misreads

> Supreme Court precedent and is inconsistent with well-reasoned decisions of our sister circuits.

Id. (O'Scannlain, J., dissenting from denial of rehearing en banc) (App. A at 3a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts Directly with the Eighth Circuit's Decision in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

The Ninth Circuit conceded that the regulation at issue below " 'discriminates' against students in religious schools, i.e., treats them differently by denying them state services on the school grounds." *KDM*, 196 F.2d 1046, 1051 (9th Cir. 1999) (App. B at 11a). This, then, is a case about admitted discrimination—discrimination against "religious ideas, religious people, [and] religious schools." *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion."). Oregon provides an immensely valuable benefit—special education services—to every eligible "child with disabilities." Petitioner has been denied this educational benefit *solely* because his parents have chosen a religious school whose purpose it is to impart religious tenets of faith and values to its students by means of religious instruction in a religious environment and setting. Respondent's Administrative Rule 581-015-0166 violates the "equal treatment" principle at the heart of the Free Exercise and Equal Protection Clauses of the First and Fourteenth Amendments to the United States Constitution and conflicts with the Eighth Circuit's decision in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

In *Peter*, two families with disabled children challenged their school districts' refusal to provide on-site special education services at the families' chosen religious schools. The school districts relied in part on a Minnesota State Rule that required districts to provide on-premises services to children who needed them at a public school or at a private *non*-religious school, but forbade provision of such services at a private *religious* school. Minnesota's distinction tracked exactly the line drawn by Oregon's Rule and the Ninth Circuit in this case. The Minnesota Rule, in the Eighth Circuit's words, "explicitly discriminated against children who attended private religious schools." *Peter*, 155 F.3d at 996.

The Eighth Circuit concluded that such "[g]overnment discrimination based on religion violates the Free Exercise Clause of the First Amendment, . . . the Free Speech Clause of the First Amendment, . . . and the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 996 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 830 (1995); and *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

The court in *Peter* held that Establishment Clause principles could not justify the discriminatory exclusion from an education benefit program. *See Peter*, 155 F.3d at 997. Minnesota's Rule, therefore, "violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection, and the district court properly enjoined its enforcement." *Id.* The Eighth Circuit noted that one school district's stated policy of religious neutrality appeared to be a "mere pretext for religious discrimination." *Id.* On remand, the district court granted full relief to the families. *Westendorp v. ISD No. 273*, 35 F. Supp. 2d 1134 (D. Minn. 1998).

The conflict between *Peter* and the decision of the Ninth Circuit below against KDM is stark. Both cases involve on-

site provision of special education benefits to disabled students attending private schools. Both cases involve governmental discrimination by withholding benefits from those disabled students who attend religious private schools, while providing the benefits to those students who attend non-religious private schools.

The Ninth Circuit held that it is permissible to discriminate on the basis of religion. The Eighth Circuit, on nearly identical facts, said that religious discrimination violates the Free Exercise Clause and the Equal Protection Clause. The Ninth Circuit said religious discrimination is permissible as long as it is just a *tiny* discrimination, such as making a blind child with cerebral palsy take a painful walk out of his religious school in the middle of his school day to travel several blocks to a fire hall.

In *Peter*, the Eighth Circuit found such discrimination unconstitutional under the Free Speech and Free Exercise Clauses. The Ninth Circuit, on the other hand, upheld such facial discrimination. It is difficult to imagine a more direct conflict than that which exists between the Ninth Circuit's opinion below and the Eighth Circuit's opinion in *Peter v. Wedl*.

II. The Ninth Circuit's Requirement That Petitioner Produce Evidence of the Substantial Burden Imposed by Respondent's Facially Discriminatory Rule Conflicts with This Court's and Other Circuit Courts' Analysis of Non-Neutral Governmental Action.

The decision below held that Oregon's "religiously-neutral setting" regulation, *as applied*, does not violate the free exercise of religion rights of KDM and his parents because it does not impose an impermissible burden on their free exercise rights. *See KDM*, 196 F.3d at 1050 (App. B at 11a). The Ninth Circuit's use of an "as applied" analysis of

Petitioner's Free Exercise challenge to Oregon's facially discriminatory regulation is in conflict with this Court's directives that a plaintiff who challenges a facially discriminatory state action is not to be subjected to the "as applied" task of producing evidence of either an impermissible or substantial burden to his free exercise of religion or of a religious animus or intent motivating the adoption of the discriminatory statute. The "substantial burden" requirement is also in conflict with the better reasoned decisions of other Circuit Courts.

The Third Circuit considered and discarded the proposition that plaintiffs must show more than a *de minimis* burden for a Free Exercise challenge to a facially discriminatory law. In *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3rd Cir. 1994), the Borough of Mahaffey intentionally targeted the plaintiffs' religious activities when it erected and locked a gate between a public park and property which was to be used by the plaintiffs for religious tent revival meetings. The district court ruled against the Free Exercise claim because the plaintiffs had not demonstrated a "substantial burden" upon their religion by the borough's actions. The Third Circuit, however, held the substantial burden analysis to be appropriate only with free exercise challenges to neutral, generally applicable laws, not to claims involving intentional burdening of religious exercise.

> The rare cases which address acts or laws which target religious activity have never limited liability to instances where a "substantial burden" was proved by the plaintiff. *See Lukumi Babalu Aye*, 508 U.S. [520], 113 S.Ct. 2217. Applying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment. . . . Because government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose, no balancing test is

necessary to cabin religious exercise in deference to such actions.

Brown, 35 F.3d at 849-850. Because the Oregon Rule is discriminatory on its face, the court below mixed apples and oranges when it required KDM to demonstrate a substantial burden upon his religion.

The decision below is also in conflict with the Sixth and Eighth Circuit Courts of Appeal, which have followed this Court's precedents in its analyses of non-neutral laws. In *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), the plaintiffs were challenging an Army regulation prohibiting on-base family child care providers from having any religious practices during day care conducted in providers' homes. The plaintiff in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1988), raised a challenge to the Minnesota law which was virtually identical to that brought herein. Neither *Hartmann* nor *Peter* required a showing that the facially discriminatory law imposed a substantial burden upon the plaintiffs' exercise of religion. Both Circuits held that *Lukumi* required them to make only two inquiries into the validity of the discriminatory statutes. "First, is there a compelling interest to justify this rule, and second is it narrowly tailored to meet that interest." *Hartmann*, 68 F.3d at 979. *See also Peter*, 155 F.3d 996-997.

The court below upheld the facially discriminatory law because there was "no showing that *application* of the regulation to KDM's case burdens KDM's or his parents' free exercise of religion." *KDM*, 196 F.3d at 1050 (emphasis added) (App. B at 10a). The court recognized that the Oregon regulation was not neutral, referring to *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990), in doing so. Nevertheless, the court immediately treated the non-neutral regulation to an "as applied" analysis and held that "as applied here" the religiously-neutral setting rule does not

result in a burden on the free exercise of religion. *See KDM*, 196 F.3d at 1050 (App. B at 10a).

Requiring Petitioner to show a substantial burden upon his free exercise of religion by the facially discriminatory Oregon rule conflicts with the analysis of a non-neutral law set out by this Court in *Lukumi* and followed by the Sixth and Eighth Circuits.

III. The Decision Below Conflicts with This Court's Precedents Holding That the First Amendment Forbids Discriminatory Exclusion from a Government Program, Benefit, or Forum on the Basis of Religious Belief, Exercise, Affiliation, or Expression.

It is the bedrock principle of this Court's First Amendment jurisprudence that the "government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Div. of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *see also, e.g., McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) ("government may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits"). If the Free Exercise Clause means anything at all, it means that government may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). As this Court said, long ago in *Everson*, this non-discrimination rule is no less fundamental than the Establishment Clause's command that the government not require or subsidize religious observance:

> [The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their

> adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

Religious exercise and expression, including choosing to educate one's child in a religious tradition, has long been valued, not feared, in our constitutional tradition. Directing and supervising a child's education, especially a disabled child, is perhaps the most important and personal constitutionally protected activity most people ever exercise. Penalizing and stigmatizing that precious activity is contrary to the principles that undergird the First and Fourteenth Amendments.

A. The Decision Below Conflicts with This Court's Decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

In *Lukumi*, this Court invalidated city ordinances that prohibited religiously motivated animal sacrifice by adherents of the Santeria religion. The Court said that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 532 (1993); accord *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("government may not . . . impose special disabilities on the basis of religious views or religious status").

Contrary to the requirement imposed by the court below, *Lukumi* does not require a litigant who challenges a facially discriminatory regulation to prove a "substantial animus" motivation for the government. *See KDM*, 196 F.3d at 1051. (App. B at 11a). Nor does it require a litigant to show that a facially discriminatory law substantially burdens his religion as does the court below. *See id.* (App. B at 11a) In *Lukumi*,

this Court expressly reaffirmed its intention that laws which are "not neutral or not of general application must undergo the most rigorous of scrutiny, . . . must advance 'interests of the highest' order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978). Yet because the Ninth Circuit could find no impermissible burden on KDM's or his parents' free exercise of religion in a state regulation that facially discriminates against them, the Ninth Circuit saw no need to apply strict scrutiny and judged Oregon's Rule "under the rational basis test." *KDM*, 196 F.3d at 1051-52 (App. B at 11a).

It is rare indeed that facially discriminatory laws could survive strict scrutiny. At a minimum, the free exercise of religion means that

> [t]he government may not . . . impose special disabilities on the basis of religious views or religious status, see McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67 (1953); cf. Larson v. Valente, 456 U.S. 228, 245 (1982).

Employment Div. v. Smith, 494 U.S. at 877. The Oregon regulation does just that—it imposes a special disability upon the religious status of being parochial school students. Under Oregon's Rule, a student in need of IDEA services may attend either a public school or a private secular school and receive services at his school. If the same student is a parochial school student, he may not receive on-site services. The First Amendment does not permit such religious discrimination absent a compelling interest, which is not present here.

In this case, no less than in *Lukumi*, the government action at issue discriminates on the basis of religion. Oregon parents who choose religious schools are denied otherwise available government services *precisely* because of the religious nature

of their choice. The judgment below thus conflicts directly with the most central principle of the Free Exercise Clause as stated in *Smith* and *Lukumi*.

B. The Decision Below Conflicts with This Court's Decision in *McDaniel v. Paty*, 435 U.S. 618 (1978).

McDaniel presented the question whether a Tennessee statute barring "Minister[s] of the Gospel, or priest[s] of any denomination whatever" from serving as delegates to the State's constitutional convention violated the Free Exercise Clause. *McDaniel*, 435 U.S. at 620. This Court noted that Tennessee extended to its adult citizens generally the right to seek and hold office as delegates, and observed that by denying that right to clergy "the State ha[d] conditioned the exercise of one [right] on the surrender of the other." *Id.* at 626. The Court stated emphatically: "In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion." *Id.*

Justice Brennan's concurrence drove home the clash between this case and *McDaniel* even more forcefully. He highlighted the fact that the Tennessee disqualification "imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *Id.* at 632 (Brennan, J., concurring). He noted that the Tennessee statute "requires appellant's disqualification solely because he is a minister of a religious faith. If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy." *Id.* at 634 (Brennan, J., concurring). After emphasizing the neutrality principle that is at the heart of the First Amendment's Religion Clauses, Justice Brennan insisted that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639 (Brennan, J., concurring).

The decision below is inconsistent with this Court's reasoning and holding in *McDaniel* and with the equality principles expounded in Justice Brennan's concurrence. Oregon has done precisely what Justice Brennan observed government may *not* do. Having decided to provide special education services to private school students, it has "use[d] religion as a basis of classification" in the administration of that program and "impose[d] a unique disability" on otherwise eligible beneficiaries who choose religious schools. *Id.* at 632, 639. Even worse, Oregon has, like Tennessee did in *McDaniel*, communicated to this blind boy with cerebral palsy and his parents that the price of enjoying a benefit generally available to a disabled student under Oregon law, on-site special education services, is giving up the right to an uninterrupted, unstigmatized education at his own school with his own classmates.

IV. The Questions Presented Are of National Importance and Affect the Nation's Efforts to Protect the Rights of Children with Disabilities and Parents of Such Children.

The constitutional questions presented in this case have broad significance for the important and ongoing effort to ensure that all children with disabilities have available to them appropriate services wherever they attend school and to "ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(a)(A) and (B)(1998). Across the nation, states and local school districts are striving to meet the needs of disabled students. Unfortunately, these initiatives have often been frustrated by confusion as to whether special education services may be provided on-site to parochial school students without running afoul of the Establishment Clause.

This Court has in recent years done much to clarify that the First Amendment does not require hostility toward religion and to emphasize that the independent choices of parents to

provide a religious education for their children should not foreclose them from otherwise-available on-site educational benefits.[2] But the failure of lower courts to reach consistent conclusions regarding the constitutionality of structurally similar educational benefit programs impedes parents' free exercise of their religious education choices for their children, in this case their disabled children, and subjects the children to shameful discriminatory treatment that would not be tolerated were it based on any suspect classification other than religion. Still, states and local governments continue to press forward with provision of educational benefits even as they await a definitive resolution by this Court of the First and Fourteenth Amendment issues surrounding the question of whether these benefits should be equally available on-site at private religious schools, particularly when, as here, those benefits would be available on-site to a child in a non-religious private school.

Universal, equal, and non-discriminatory treatment for all children, in this case specifically for disabled children who attend religious schools, depends upon a clear ruling from this Court that (1) educational benefit initiatives are generally consistent with the Establishment Clause's neutrality mandate; and, more specifically, (2) educational benefit programs such as IDEA may not discriminate against disabled children whose parents choose to send them to religious schools.

---

[2] *See Mitchell v. Helms*, — S.Ct. —, No. 98-1648, 2000 WL 826256 (U.S. La. June 28, 2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

CONCLUSION

For all the foregoing reasons, Petitioner urges this Court to grant the requested Petition for Certiorari and to resolve the constitutional questions presented in this case in favor of equal treatment and free exercise.

Respectfully submitted,

Of Counsel:
RICHARD W. GARNETT
Notre Dame Law School
Notre Dame, IN 46556
(219) 631-6981

MICHAEL STOKES PAULSEN
University of Minnesota
Law School
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-0018

DAVID C. GIBBS, JR.
Counsel of Record
DAVID C. GIBBS III
CHARLOTTE A. COVER
BARBARA J. WELLER
GIBBS LAW FIRM, P.A.
5666 Seminole Boulevard,
Suite 2
Seminole, Florida 33772
(727) 399-8300
Attorneys for Petitioner